

The Advocate



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YEARS IN THE MAKING, FELONY EXPUNGEMENT LAW PASSES

by Molly Rose Green

One in three Americans has a criminal record. As the Wall Street Journal recently stated, “America has a rap sheet.” Even for low-level offenders, a criminal record can act like a permanent mark, creating lifelong obstacles to employment, education, and housing, among other consequences.

On April 12, 2016, Governor Matt Bevin signed House Bill 40, a felony expungement law years in the making. Before House Bill 40, expungement was unavailable to citizens convicted of even the lowest level felonies. The new law makes substantial changes to expungement in Kentucky by creating a felony expungement procedure and greatly easing misdemeanor expungement, among others.

- House Bill 40 creates a list of 61 Class D felonies that are eligible for expungement, including possession of a controlled substance, possession of a forged instrument, theft by unlawful taking, criminal mischief, tampering with physical evidence, and burglary in the third degree. The list covers an estimated 60-70% of Class D felony charges. Drug trafficking and wanton endangerment, among others, are not covered by the bill.
- House Bill 40 has a five-year waiting period after the completion of sentence. To be eligible, a person must also have a “clean slate” with no misdemeanor or felony convictions for the five years prior to filing for expungement.
- A person seeking to expunge a felony will first apply to have their conviction vacated, via a new AOC application form. If granted, the conviction(s) will be expunged. The cost for felony expungement is \$500, and a person may take advantage of felony expungement only once in a lifetime.
- House Bill 40 also significantly changes misdemeanor expungement. It removes the look-back period that required a person to have a clear record in the five years before the conviction they were seeking to expunge. The new law only requires that a person have a clear record for the five years before filing for expungement. It also permits the expungement of multiple sets of misdemeanors.
- The law permits a person who went to a grand jury and was not indicted to expunge those charges after 12 months.
- The law will go into effect July 15, 2016.



Supporters of Representative Owens’ felony expungement bill, House Bill 40, celebrate the signing of the bill by Governor Matt Bevin on April 12, 2016 in the Capitol Rotunda. Picture provided by the KY Chamber of Commerce.

The passage of this law was the result of years of hard work and perseverance by many, including its primary advocate Representative Darryl Owens of Louisville who tirelessly championed the bill in the House for years. The dedication of Representative David Floyd, Senate President Robert Stivers, and Senator Whitney Westerfield, among many others, was also vital. Several key factors helped to change the landscape this year. The Kentucky Chamber of Commerce supported felony expungement, helping promote the idea that expungement is an economic issue, as criminal records keep many out of work. Governor Bevin’s support of felony expungement was also critical. Finally, a new broad-based coalition formed, Kentucky Smart on Crime, bringing together religious organizations, economic think-tanks, business interests, and social justice groups in support of this important legislation.

While House Bill 40 helps Kentucky to take an important step in joining the many states permitting felony expungement, the bill is not without criticism. High fee’s associated with expungement have been described by PBS, the Marshall Project, and the Collateral Consequences Resource Center as prohibitive, preventing eligible people from seeking expungement.

Because the expungement law does not state that the \$500 fee is not waiveable, attorney’s assisting low-income or indigent clients should attempt to have the fee waived. The indigent client should be instructed to file a Petition to Proceed in Forma Pauperis, which is a request that due to financial inability, he or she should not be required to pay the filing fee. An interactive form to help a client complete their Petition to Proceed in Forma Pauperis is

available at the Legal Aid Network of Kentucky website: <http://kyjustice.org/interactive-form-forma-pauperis-waiver-court-and-service-fees>.

Attorneys can also argue for waiver of fees citing KRS 453.190, which states that, “a court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs.” Further, *Spees v. Kentucky Legal Aid*, 274 S.W.3d 447 (Ky. 2009), discusses Supreme Court authority that “the inability to pay a fee may not bar the adjudication of a claim or prevent the initiation of a claim.” *Id.* at 449.

In light of the new felony expungement law, and the high costs both of filing and of securing representation, the KACDL, along with Clean Slate Kentucky and legal aid organizations

are partnering to host a series of expungement events. These events are aimed at low-income and indigent people and will provide information on eligibility and the expungement process. They will occur in late-July and early-August in Lexington, Covington, and Eastern Kentucky. We are seeking volunteer lawyers who are willing to attend a session and/or to represent a client from start to finish through the expungement process on a pro bono basis. For more information or to volunteer, contact Molly Green at molly.green@ky.gov. With your help, we hope to assist as many needy Kentuckians as possible.

A list of free information sessions on the expungement process and further resources on expungement in Kentucky are found at: <http://www.cleanslatekentucky.com/>

2016 NEW LEGISLATION

by Damon Preston



Damon Preston

Deputy Public Advocate

The 2016 Kentucky General Assembly was highlighted by passage of the state’s first felony expungement bill, but many other initiatives were passed that will affect criminal prosecutions. Here are the other new changes to criminal law this year with some legal questions that some of the changes raise for litigation.

1. 10-Year Window for DUIs – SB 56 expands the period of time a prior DUI conviction can be used to enhance a subsequent one from five years to ten years. This will result in many cases that would have been prosecuted as a first-offense DUI being prosecuted as more serious DUI 2nd or DUI 3rd cases. In addition to impacting the jail and prison costs for those defendants who are convicted, this change will impact DPA caseloads as the guaranteed jail time of subsequent offense DUI cases often results in prolonged pretrial litigation and more frequent trials.

A legal question is whether DUI convictions prior to the effective date of the new law can be used if they were older than five years. At the time a defendant was found guilty of DUI, he or she was informed that it would be subject to enhancement for five years. Once more than five years passed, could that still be used for enhancement if the law was changed? This issue is already being litigated and will eventually be resolved by the appellate courts.
2. Expanded Jail Credits for misdemeanants – HB 132 greatly expands sentence credits that are available to inmates serving misdemeanor sentences in local jails. Credits that were previously discretionary with the jailer and subject to

denial by a court are now mandatory and cannot be denied by a jailer or court. An inmate who works in the jail or who performs community service is entitled to a day’s credit for every forty hours worked and all inmates receive up to five days credit per month for good behavior (to be determined by the jailer, but it must be granted in a uniform manner). Additionally, any inmate that receives a high school diploma or GED while serving a sentence receives a 30-day credit. Altogether, a misdemeanor inmate who works or does community service would serve out a 12-month sentence in a little over 9 months. If he gets his GED during that time, he could be released shortly after completing his 8th month. This does not fully equate a 12-month misdemeanor sentence to a 1-year felony sentence, but it comes close. The convicted felon will still serve out his sentence a few weeks before the misdemeanant.

3. Killing mugshots.com – HB 132 outlaws the use of jail mugshots by private companies who publish magazines or run websites for profit requiring the payment of a fee for the removal of a mugshot. Any such company would be liable for civil damages up to \$500 per day.
4. Retreat from HB 463 by Expanding Arrest Powers – HB 250 authorizes peace officers to arrest a suspect for four specified misdemeanors – receiving stolen property, domestic violence shelter trespass, possession of burglar’s tools, and giving a peace officer false identifying information. This walks back from the requirement in HB 463 that officers issue citations in these circumstances. Arrests were already authorized in situations where a suspect disobeyed a peace officer or represented an ongoing threat to public safety. Officers would now be able to take all suspects for these offenses into custody and subject them to searches and questioning. The original version of this bill would have repealed this part of HB 463 in its entirety and allowed arrests for practically all misdemeanors. The more expanded bill is likely to be introduced again next year.

While the bill itself is clear, its application could lead to some issues for the defense. Since these specific offenses have been added to the limited number of misdemeanors that can lead to an arrest, could a defense challenge any subsequent search or interrogation on the grounds that there was no probable cause for the specific charge that was the basis for the arrest? For example, if the justification for an arrest is possession of burglar's tools and the alleged tool is a screwdriver in a truck, a challenge could be made that this should not have been sufficient for an arrest on that charge and any subsequent search or statement is invalid.

5. **Synthetic Drugs** – In response to the “flakka” epidemic in Eastern Kentucky, HB 4 was passed raising the penalties for synthetic drugs. Two specific synthetics were written into the definition of Schedule I drugs, possession offenses were raised from a B misdemeanor to an A misdemeanor (with a felony 2nd offense), and trafficking was raised from a misdemeanor to a Class D felony (with a C felony 2nd offense). Finally, Unlawful Transaction with a Minor that had previously exempted synthetic drug crimes was amended to authorize up to a Class B felony for providing any synthetic drugs to a minor, an act that was previously punishable as a misdemeanor.
6. **Course of Conduct charge** – SB 60 created a new crime (or a manner of committing an existing crime) called Committing an Offense Against a Vulnerable Victim in a Continuing Course of Conduct. This new offense would apply when a person is charged with multiple instances of specified crimes against children, disabled or elderly victims. Instead of proving each separate incident, the prosecution would have the option of proving that the crime was committed at least two times in a period of time without proving which specific incidents occurred. While this would be simpler to prove in some cases, the result would be that the defendant would be convicted of a single count at the same level rather than multiple counts.

The new Course of Conduct option raises a few legal issues. One question is whether SB 60 creates a new offense or simply a manner of committing an offense (like complicity or facilitation). If it creates a new offense, then it may not be subject to sexual offender registration (even if the underlying offense would qualify). A second question is whether the defense would be entitled to a jury instruction on Course of Conduct as an alternative in a multi-count indictment. Finally, there is the underlying fundamental question of whether a conviction under a Course of Conduct prosecution meets the requirements of a unanimous verdict if jurors only agree that a crime was committed at least twice and are not required to agree on which specific incidents occurred.

7. **Open Courts in Dependency, Abuse, Neglect, and Termination of Parental Rights Cases** – SB 40 authorizes a pilot project in three or more judicial districts for courts to be

open in juvenile cases involving dependency, abuse, neglect, or termination of parental rights. Previous versions of the bill, including the original version of SB 40, would have also opened some delinquency proceedings, but the bill was amended to remove delinquency cases. Defense attorneys who have clients with dependency, abuse, or neglect cases in juvenile court should be aware that some such proceedings may be open in the future.

8. **Sexual Assault Kits requirements** – After the state auditor's report in 2015 relating to untested sexual assault kits, SB 63 was passed to address the deficiencies in the system. It established a timeline for sending kits to the lab and for the lab in performing the testing. While the bill specifically says that failures to meet the deadlines are not grounds for dismissal of a case or exclusion of evidence, the existence of the deadlines may impact cases in various ways. Sometimes cases will be ready for trial faster and other times defense counsel may need to litigate appropriate remedies for the failures of law enforcement or the lab to comply with the law.
9. **Homelessness Prevention Project** – SB 225 expanded an existing pilot project to become a statewide joint effort between the Cabinet for Health and Family Services and the Justice and Public Safety Cabinet. The project would provide voluntary services to persons with serious mental illness, persons between 18 and 25 and at risk of serious mental illness and being released from a mental health facility, persons with a history of multiple utilizations of health care, mental health care, or the justice system, persons being released from prison, and persons aging out of foster care who are at risk of homelessness. The services are limited to available funding, but the project establishes a structure for preventing homelessness among the at-risk population. SB 225 also establishes the Kentucky Interagency Council on Homelessness.
10. **Powdered Alcohol** – SB 11 was a wide-ranging bill that changed many aspects of alcohol sales in Kentucky. Among those changes is a prohibition on the possession or sale of powdered or crystalline alcohol (sometimes called Palcohol). Both possession and sale would be punishable as Class B Misdemeanors.
11. **Harassing Communications** – HB 162 added the word “electronic” to the methods of communication that could qualify as harassing under KRS 525.080. Electronic communication is now included with telephone, mail, and (yes, still there) telegraphic communication.
12. **Dog Fighting** – HB 428 amended KRS 525.125 to apply only to dogs (not to all “four-legged animals”) and expands culpability for dog fighting to anyone who owns, possesses, trains or transfers a dog for fighting purposes. Important exceptions are included to exclude dogs who are used in hunting or in guarding livestock.

IT IS TIME FOR CRIMINAL JUSTICE REFORM IN KENTUCKY

by Ed Monahan and Damon Preston



Ed Monahan
Public Advocate



Damon Preston
Deputy Public Advocate

The time is now to restore proportionality and reasonableness to the overall structure of the penal code and other parts of our criminal justice system, holding all offenders accountable, but reserving the most severe penalties for those whose conduct reflects the most severe breaches of public safety and values.

There are commonsense ways to reduce the correctional population safely. Reducing incarceration costs will then allow resources to be reallocated to reducing recidivism through community-based, individual treatment.

The 1974 Kentucky Penal Code was a model of principled, coordinated provisions that were rational and internally consistent. Since then, that Code has substantially been degraded by repeated yearly amendments that have undermined its consistency. There should be an integrated revision of the Kentucky Penal Code, taking advantage of the draft done 13 years ago.

In 2003 the Kentucky Criminal Justice Council produced a proposed revision of the Penal Code after extensive work and under the guidance of Paul Robinson, a former federal prosecutor and the nation's foremost penal code expert. That draft is found online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526674. It was never enacted but remains the most thoroughly considered proposed revision currently available.

The moral credibility of the Kentucky Penal Code has been significantly corrupted as a result of its irrationalities and internal inconsistencies that have been drafted onto it since 1974. Paul Robinson describes this degradation in "The Rise and Fall and Resurrection of American Criminal Codes," 53:173 University of Louisville Law Review 173 (2015), found online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527971.

Penal Code revision is matter of the highest order because "... criminal law that has earned a reputation with the community

as a reliable moral authority gains the power to move people to internalize the law's norms. And that can be a more powerful—and a less expensive—mechanism of gaining compliance than any threat of criminal sanction. But irrationalities and internal inconsistencies in a criminal code can quickly undermine the criminal law's moral credibility, and thereby undermine its power to gain compliance and deference through social influence." *Id.* 177.

Here are a few ways to realign the way we are spending tax dollars to provide more treatment resources and to achieve more sustainable outcomes:

Reform Kentucky's Mandatory Minimum Laws

Persistent Felony Offender law – Kentucky's repeat offender law is among the broadest and most severe in the country, contributing more than anything else to the enormous growth in the prison population over the past 30 years. Mandatory minimums in the form of PFO laws in Kentucky "essentially guarantee a stream of injustices, as some offenders in some cases really will have the kind of important mitigations that demand a sentence in the lower end of the range forbidden by the mandatory minimum. This guarantee of a string of mandatory minimum injustices can only serve in the long run to undermine the criminal justice system's reputation for being just, for being a reliable assessment of the punishment that each offender genuinely deserves." *Id.* at 180.

Below are changes that would moderate the disproportionate effect the PFO law has on criminal sentences, but maintain the ability for career criminals to be imprisoned for long periods.

- Eliminate PFO 2nd Degree, which establishes a Mandatory Minimum sentence of five years for convicted felons, and reinstate a single Persistent Felony Offender law, as was originally enacted.
- Amend the Persistent Felony Offender law in any of the following ways:
 - Require at least one prior period of felony incarceration;
 - Limit the triggering (prior) convictions and the current offenses that make an offender eligible for PFO (possible limitations include violent offenses, offenses involving injuries, or Class C felonies and higher);
 - Change the enhancement from raising the mandatory minimum sentence a full grade to raising the minimum sentence within the existing range (i.e. instead of increasing a Class D felony from 1–5 years to 5-10 years, the new range would be 3-5 years);
 - Give the Parole Board discretion to consider parole by eliminating the 10-year parole eligibility for Class C

felonies enhanced by first-degree PFO; and

- Make the application of PFO discretionary rather than mandatory so that a prosecutor could request the enhancement, but a judge or sentencing jury could decide that it is not appropriate in a given case.
- Eliminate the double-enhancement that results when a PFO-enhanced sentence is ordered to run consecutive to a revoked sentence for a prior felony. The prosecution could elect to proceed with a non-enhanced consecutive sentence or an enhanced concurrent sentence. Either option would sufficiently punish the two-time offender with additional prison time.

The 2008 Kentucky Criminal Justice Council recommended that PFO 2d be eliminated and that the 10 year restriction of PFO parole eligibility be removed.

In FY14, the Commonwealth spent \$65,388,822 to incarcerate 2,967 individuals serving PFO-enhanced sentences for non-violent offenses. The average sentence of these individuals is more than 20 years. By the end of their sentence, the total cost will be more than \$1.3 billion to house these non-violent offenders.

Violent Offender Law – KRS 439.3401 requires all offenders convicted under 43 different statutes to serve a Mandatory

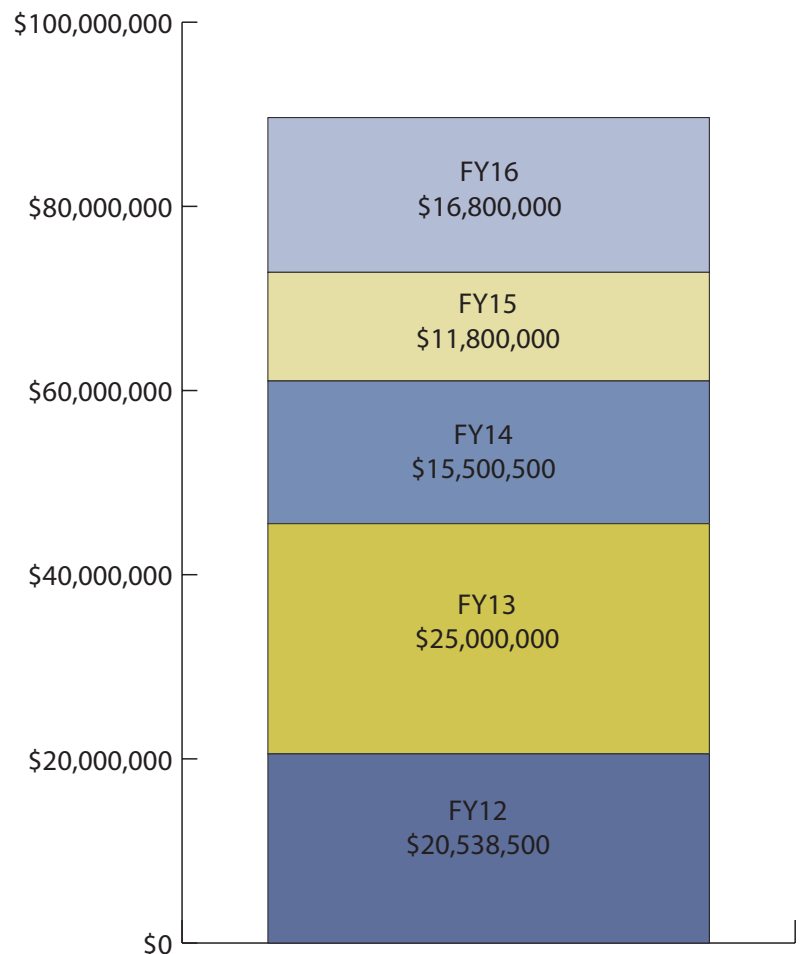
Minimum of 85% of their sentence before any possibility of release. This statute constitutes an overbroad limitation on the discretion of others within the system, including the court, the jury, and the Parole Board. The changes below would target this important public safety tool at the “worst of the worst” as intended, but allow discretion in appropriate cases for release earlier than the current mandatory minimum service.

- Return parole eligibility to 50% of the sentence or 12 years, as it was prior to 1998; and
- Limit the reach of the law to the offenses included in the original law (Capital offenses, Class A felonies, or Class B felonies involving the death of the victim, or rape in the first degree, or sodomy in the first degree of the victim or serious physical injury to a victim)

Raise the felony theft threshold to at least \$1,000 (KRS 514.030)– At least 30 states set the threshold for felony theft at \$1,000 or higher. Kentucky is one of only 15 states with a misdemeanor limit of \$500 or lower. The determination of the felony threshold should reflect the amount at which a theft is of something that is beyond normal consumer or lifestyle items. With the current limit, the theft of a cell phone or an iPad would usually be charged as a felony since these have list prices of over \$500. To elevate a crime to a felony should require more than these types of theft offenses.

Necessary Governmental Expenses for KY Corrections Due to State Inmates Above Projections

**\$89.6 MILLION
OVER THE
LAST 5 YEARS**



Create a classification for Gross Misdemeanors - The status of “convicted felon” remains one the biggest impediments to successful reentry into society. DPA supports the concept of a classification between a Class A misdemeanor and a Class D felony and believes that classification should fall on the side of a misdemeanor rather than felony. A gross misdemeanor classification would be a hybrid of the current felony and misdemeanor categories:

- Sentencing Range of six months to two years;
- Expungable;
- Automatic or highly presumptive probation with a clear and convincing standard for any denials of probation; and
- Supervised by or incarcerated at the expense of the Department of Corrections, not counties.

This new category of offenses is necessary to meld the need for sanctions greater than typical misdemeanors but less than the life-changing impairments of felony convictions. Offenses that could fall into this category include Nonsupport between \$1,000 and \$10,000, Theft between \$500 and \$2,500, Possession of a Forged Instrument under \$500, and Welfare Fraud under \$5,000.

Remove Flagrant Nonsupport and Nonsupport from the criminal code – Rather than continuing to spend thousands and tens of thousands of public dollars to punish deadbeat dads because we are mad at their refusal to support their children, complete jurisdiction should be turned over to Family Courts (or District/Circuit in their civil capacity where no Family Court exists). Family Courts already enforce sanctions for nonpayment through contempt authority and that would continue and could be expanded. If criminal penalties are to remain to address extreme cases, the threshold for Flagrant Nonsupport should be \$10,000 or higher in cases where the defendant has a demonstrable ability to pay.

Require best practices in eyewitness identification - Innocence Projects, both in Kentucky and around the country, have demonstrated that erroneous eyewitness identification is the most common factor in wrongful convictions. Law enforcement agencies in Kentucky should adopt uniform evidence-based practices relating to eyewitness identifications.

Remove permanent employment restrictions based solely on felon status - Currently, convicted felons risk losing or being denied a license in many fields including chiropractic care, barbers and hair stylists, emergency medical technician, paramedic, dispatcher, motorcycle safety instructor, and private

investigator, and cannot work in any establishment with an alcoholic beverage license for two years after conviction. While expungement will help some felons after a period of time, all broad permanent disqualifications of all felons should be removed.

Create an intensive case management system for offenders with mental illness - For persons with mental illness who have committed a crime, an intensive case management system should be created in place of incarceration as outlined by Joel A. Dvoskin Ph.D. and Henry J. Steadman Ph.D., “Using Intensive Case Management to Reduce Violence by Mentally Ill Persons in the Community,” *Hospital and Community Psychiatry* 45:7, 679 (July 1994).

Amend KRS 635.020, KRS 640.010, and related statutes to eliminate mandatory transfers of juveniles to circuit court – Studies consistently show that the threat of adult prosecution is not a deterrent to juvenile crime, and that overuse of adult prosecution actually increases recidivism and reduces public safety. Nevertheless, Kentucky law continues to provide that a child who is older than 13 who uses even an inoperable firearm during the commission of the offense is subject to mandatory adult prosecution. In order to address that, KRS 635.020(4) and KRS 635.025 should be repealed, and KRS 640.010 should be amended to add “use of a firearm” to the list of available factors favoring transfer.

Amend KRS 610.010(1) to establish a minimum age of delinquency – Under common law, a defense of “infancy” existed, based on the premise that some children are too young to be held criminally responsible for their behavior. Kentucky does not currently recognize such a defense. As a result, very young children are sometimes brought into court to face public offense prosecutions. A minimum age of at least 11 should be established for a child to be charged with a public offense.



“Draconian punishments for minor infractions, an ever-expanding prisoner population and a legal regime that allows authorities to seize property without a warrant are all slowly eroding the freedoms that the nation has come to expect. For years, lawmakers have focused almost exclusively on being ‘tough on crime,’ all the while forgetting to get ‘smart on crime.’”

Grover Norquist
May 11, 2015

Implement sentencing and institutional structures that recognize the immaturity and potential of young adult offenders – Research shows the human brain is not fully developed until around the age of 25. Not unrelated data shows that the likelihood of criminal behavior peaks between the ages of 18 and 24. These two conclusions should open the door to an evidence-based response in the criminal justice system, recognizing age as a mitigating factor and capitalizing on the potential for meaningful reformation of the still-developing offender. We endorse the recommendations in Rebecca Diloreto's article, "Shared Responsibility: The Young Adult Offender," 2014, Northern Law Review, 41:2, 253.

Reduce some misdemeanors to prepayable violations - The reduction of some minor misdemeanors to violations would save state money on many levels:

- Less Court Proceedings (particularly for violations that could be designated prepayable);
- No appointment of state-provided counsel;
- No arrest or jail expenses;
- No conditional discharge or supervision costs;
- Increased court revenue through prepaid fines and costs; and
- Reduction of prosecution and law enforcement resources required as cases are resolved through prepayment.

Defendants would still be charged and, if guilty, be held accountable for their actions, yet still maintain their trial rights if wrongly accused.

The American Bar Association has adopted a resolution in support of the reduction of appropriate misdemeanors to allow for civil fines instead of criminal penalties. "The decriminalization of minor, nonviolent misdemeanors will allow police, prosecutors, and defense attorneys to focus on more serious cases, while also providing states with a stream of income derived from civil fines." Decriminalization of Minor Offenses, ABA State Policy Implementation Project (2010).

Under Kentucky's system, this could be accomplished by reducing Class A or B misdemeanors to violations. Possible offenses for reduction include: Possession of Marijuana, Controlled Substance Not in Proper Container, Possession of Drug Paraphernalia, Unlawful Access in the Third and Fourth Degree, Criminal Trespass in the Second and Third Degree, Criminal Possession of a Noxious Substance, Criminal Littering, Unlawful Assembly, Harassing Communications, Disorderly Conduct in the Second Degree, Public Intoxication, Disrupting Meetings in the Second Degree, and Unlawful Transaction with a Minor in the Second Degree (Truancy).

Implement a clear and convincing evidence standard for pretrial detention and denial of bail credit – HB 463 had a clear legislative intent of increasing pretrial release of low and

moderate risk defendants. In many places, this intent has been thwarted by judges who routinely detain low and moderate risk defendants, making bare findings that the exceptions in the bail statute (risk to public, risk of flight) are present. When these decisions are challenged on appeal, the standard for review is whether the court's decision was an abuse of discretion, a standard that requires appellate courts to uphold very different practices across the state because each court individually applies its own discretion. A clear and convincing evidence standard would lead to more uniformity across the state because courts would have to have clear evidence on the record that is convincing in support of a decision to detain a low risk defendant. In the absence of such evidence, the legislative intent of HB 463 would have to be followed.

Require a court considering revocation to consider graduated sanctions and to have clear and convincing evidence for revocation – While the Department of Corrections is required to have a system of graduated sanctions in place, there is no existing requirement that a trial court recognize or endorse that structure.

A court that does not agree with graduated sanctions could revoke at the first opportunity despite the recommendation of a lesser sanction by a probation officer. Revocations should only occur after the graduated sanctions system has been utilized and only when the evidence in support of a probation violation is clear and convincing.

Create method for inmates to earn parole – Create reasonable criteria that, if met at the time an inmate is scheduled to be considered for parole, would result in release of the inmate on parole without consideration by the Parole Board. Multiple avenues for Earned Parole could be established, but the criteria could include:

- The risk level of the inmate, based on a validated risk assessment;
- The offense for which the inmate is serving time;
- The institutional behavior of the inmate, including the number and nature of institutional infractions;
- The age of the inmate and the amount of time served prior to the parole consideration;
- The completion of institutional programs of which the inmate has been given a reasonable opportunity to complete;
- The percentage of overall sentence served; or
- Prior parole revocations.

Examples of when Earned Parole could be authorized:

- A low-risk inmate serving a sentence for a non-violent Class C or D felony who has no violent institutional infractions;
- An inmate turns 60 years old after serving 5 years or 50% of his sentence, whichever is longer; or

- A low or moderate risk inmate serving time for a non-violent offense reaches 50% of his sentence and has never been granted parole.

Eliminate Parole Upon Completion – The Parole Board currently includes in its parole rates cases where an inmate is technically granted parole, but the start of parole is delayed weeks, months, or even years until an institutional program is completed. Eliminating this practice would provide more transparency and accuracy in the parole rates, but also reduce the prison population by not delaying release for inmates deemed

suitable for parole. The elimination could be accomplished in two ways:

- Create a pre-parole review twelve to eighteen months in advance of parole eligibility from which the Parole Board can advise an inmate of any programs that must be completed prior to parole; or
- Require that any required programs for which an inmate eligible for parole has not been provided a reasonable opportunity to complete prior to the parole hearing must be completed as a condition of parole after release.

CHANGES TO MISDEMEANOR JAIL CREDITS IN KENTUCKY

by Damon Preston

In the 2016 General Assembly, House Bill 132 passed to expand service credits available to inmates serving misdemeanor sentences in Kentucky. Though it received little notice, this bill will lead to great benefits to county governments and local communities in the Commonwealth.

Benefits of expanded jail credits:

1. Substantial savings to county governments
2. Incentives for inmates to maintain good behavior
3. Expansion of inmate community service and work programs
4. Recognition of educational attainment by inmates

What credits are available to misdemeanor inmates?

- Service Labor - Labor performed in a community service program outside the jail or labor performed inside the jail for maintenance or jail operations (including food service):
 1. Eight (8) full hours of work = One (1) sentence credit
 2. Five (5) sentence credits = One (1) day credit off of full sentence

So, 40 hours of work leads to a deduction of 1 day off the full sentence.

- Education - Successfully attaining a high school diploma or general equivalency diploma – Thirty (30) days credit to be deducted from the full sentence
- Good Behavior – Credits are available in an amount not to exceed five (5) days for each month served, to be determined by the jailer for the conduct of the inmate.

How are credits granted, denied, or withdrawn?

- Credits are determined by the jailer, not the courts – Prior to HB 132, misdemeanor sentence credits could be denied by a district court in any specific case. That power has now been removed. As with felony sentences, the court will impose a sentence of a designated length and the jailer will determine the release date after calculating any credits that are appropriate. There is no authority for the court or a prosecutor to overrule a jailer's granting of credits.
- Credits are mandatory – KRS 441.127 was amended to make

the granting of the appropriate sentence credits mandatory. If an inmate qualifies for a credit, it must be granted by the jailer. No application or request by the inmate is necessary.

- Credits must be uniform – All jail credits must be granted in a uniform manner so that all inmates are treated the same and credits are not granted in an inconsistent fashion.
- Credits may be lost - If an inmate violates the rules of the jail or engages in other misconduct, the jailer may withdraw sentence credits earned by the inmate.

What effect will these credits have on sentences?

Until HB 132, misdemeanants generally served sentences day for day, unless limited credits were given at the discretion of the jailer and not rejected by a court. Under HB 132, credits are expanded and most will be automatic, leading to predictable outcomes.

Assuming an inmate works 40 hours each week in community service or for the jail, receives 5 days each month for good behavior, and does not suffer the withdrawal of credits due to bad behavior, below are the estimated number of days to be served for each sentence. If a high school diploma or GED is obtained during the service of the sentence, reduce the estimate by 30 days.

Estimated time to be served:

30-day sentence	27 days
60-day sentence	49 days
90-day sentence	70 days
180-day sentence	140 days
365-day sentence	281 days

FAYETTE DISTRICT COURT'S CHILD SUPPORT SPECIALTY COURT**by Larry S. Roberts, Fayette County Attorney**

Larry S. Roberts
Fayette County Attorney

In Kentucky, each County Attorney has the option of contracting with the state to collect the child support in their respective county. The collection of delinquent child support has always been a huge problem for our state. In our city alone, there are over 5,000 people who each owe \$5,000.00 or more in arrearage. And, there are thousands of prosecutors throughout this country who try diligently to collect these astronomical sums of money.

Unfortunately, we are successful

in literally getting only the top of the iceberg. Chasing “dead beat” dads has proved only minimally successful by imposing jail and penitentiary sentences, and the costs of incarceration compound the debt to society.

Since taking office as Fayette County Attorney in 2006, I have tried to find ways to change the same old collection process which has always been very frustrating to custodial parents, as well as our prosecutors and their support staffs. The threat of court Ordered Contempt sometimes works to collect arrearages, and the use of the ultimate penalty of a criminal conviction for flagrant non-support might have some deterrent/incentive effect on behavior of some non-custodial parents. However, I have observed the continued increasing arrearages with the children becoming adults and the cases of large sums of arrearage just

is not paying the support. She threatens arrest if he comes to see his children, resulting in anger and frustration with many fathers eventually giving up and running to avoid arrest. Some fathers simply refuse to accept any financial responsibility. Mothers are often forced to receive welfare supplements from the state. These payments add to the arrearage that must be collected from one or both of the parents.

It is very common for children, who are reared by a mother who is not receiving child support from the father, to develop tremendous feelings of abandonment and anger toward their father and men in general. Quite often the cycle of non-support continues to a new generation. This is very detrimental to them ever establishing a healthy marital and parental relationship. All too frequently little girls caught in this life style seem to gravitate to men who treat them in the same manner as what they observed their mothers endured. Sadly, many little boys growing up in this environment acquire the same character traits as their fathers and the cycle continues.

In April, 2010, the Fayette District Court established a Child Support Specialty Court. This Court handles newly charged felony cases of Flagrant Non-Support in the fashion similar to that of traditional drug courts. The individual, who is charged with the felony, is given the option of being held to the Grand Jury and facing the consequence of being found guilty of either a felony or misdemeanor, or agreeing to being placed in the Child Support Specialty Court, which is presided over by District Judge Bruce Bell. The case is amended to a misdemeanor.

Each individual is closely supervised to insure that they obtain needed G.E.D. or vocational education. If there is a substance or

Flagrant Nonsupport Incarceration in Kentucky is Costly

Felony Flagrant Nonsupport Offenders Incarcerated in FY2015

678

Felony Offenders Incarcerated on Flagrant Nonsupport Only in FY 2015

249

Average Sentence Length for FY 2015 Flagrant Nonsupport Only Offenders

**1662 days
(4.55 years)**

Total Time served in FY 2015 by Flagrant Nonsupport only offenders

54,989 days

staying on the back burner indefinitely.

There are large numbers of social problems which result from the failure/refusal of a father to pay support for his child or children. For example, many fathers do not pay their court-ordered child support because of their inability to hold jobs due to prison records, lack of education, or drug/alcohol addiction. Many mothers refuse to allow visitation of the father because he

alcohol abuse problem, the individual is required to participate in appropriate counseling and urine screening, and he/she is carefully monitored by professional court staff. This Specialty Court has an employment coordinator, hired by the County Attorney's Office with non-budgeted funds, and that individual helps each defendant obtain employment and monitors their work records on a weekly basis. Additionally, this employee supervises every Defendant in a sixteen week parenting class,

which is a mandatory requirement for each participant.

With everyone working closely with the court, it is our goal to help each defendant successfully complete the program and eliminate or make a substantial decrease in his arrearage. The structure of our Specialty Court is copied after the typical Drug Court models utilized throughout the United States which helps the individual discontinue his drug usage but has the final result of a conviction. However, our Court differs in the final resolution for when the judge determines there has been a successful completion, the criminal charge will be dismissed and the record will be expunged. Having a true beneficial carrot of expungement for the participants to work toward is the aspect of the program which makes the whole process successful.

Currently, to my knowledge, there is no other Child Support program in the United States that combines both the threat of a criminal conviction and the incentive of having the record totally expunged. Our ultimate purpose of this Specialty Court is to enable a non-custodial parent to become financially supportive of his child, as well as recreating and maintaining a healthy relationship with his child.

For a program of this nature to be successful, I believe it is paramount that all parties must fully believe in the concept. The County or Commonwealth Attorney must be able to “sell” the program to the defense bar and their clients. My assistant prosecutors often personally talk with the defendant and counsel to explain the requirements and ultimate benefits. The most important role is that of the judge. In our case, Judge Bruce Bell does a wonderful job in communicating with the participants in a way they clearly know he is the boss and will insist they follow the rules, but at the same time he leaves no question that he is genuinely interested in each one of them as individuals. Judge Bell requires that each defendant remain in the courtroom until every case is heard. This permits every person to listen to him as he briefly discusses the individual issues of each defendant and observe the discipline or accolades that he gives for the progress or failures by the rest of the group.

This court is run differently than a typical probation where a defendant usually has only monthly contact with a probation officer and no contact with a judge unless there is a violation of conditions. Each defendant in the Child Support Specialty Court has two to three contacts with Court personnel each week in addition to regularly scheduled meetings with Judge Bell.

The ultimate question is: Does it work? To date, there have been one hundred fifty two (152) individuals enter the Child Support Specialty Court and seventy four (74) have successfully completed the requirements, resulting in their record of the criminal charge being dismissed and expunged. We have collected \$306,061.36 in payments on current obligations and arrearages from the participants, all of whom were not making any payments prior to being included in the program. To date, every one of the individuals who has graduated has continued to make their current payment obligations. From a societal standpoint, we have seen fathers who were having very little contact with their children, now being able to build a meaningful relationship with their sons and daughters.

Many prosecutors and Courts believe they must obtain a federal grant in order to start programs. I am confident that it is not necessary to have federal grants to implement a program of this nature. We initially began by utilizing volunteers to go into the community to find local businesses that would agree to hire participants in our program if they had a need in the future. Most of the companies even agreed to employ convicted individuals with non-violent felonies if they were associated with our program. Our volunteers obtained the commitments from one hundred (100) employers. The selling point to the business owners was that each individual would be closely supervised by Court personnel. From our perspective, the employer serves as a daily check for our program because if there was any problem with work attendance, we were notified immediately.



W.Chris Tracy
Directing Attorney
Lexington North

“Failing to pay child support is too often a crime of not having enough resources, or facing too many obstacles, economic, educational, or otherwise. The child support program in Lexington is making a real difference for a select group of men and women who are looking to better their circumstances and get on the right side of the law. For some, it marks the first time they have ever gotten help in finding and keeping a job, or had the structure of checking in weekly, showing responsibility. Dismissal and expungement drive the participants to work hard, and Fayette County collects revenue instead of paying to uselessly incarcerate these individuals.”

2016 RECOGNITION CEREMONY



"I know that in your life, and in your work, you must feel at times like Sisyphus, pushing a giant stone uphill, and wondering when that will come to an end. My message to you today is ... to continue doing the right thing, even when the right thing is the difficult thing. Our founding documents espouse justice and equality, but without effective advocates those words become mere abstract principles. You make real the promise of equality and fair play. You are the impenetrable bulwark standing between the excesses of government and the protection of those accused."

Judge Bernice B. Donald, United States Court of Appeals for the 6th Circuit



"Kentucky has a lot of really great stories to tell about justice reform both for adults and juveniles. Kentucky in just two or three short years went from one of those states who led the world in detention of kids who committed no crimes – status offenders – and also detention of public offenders at about the same rate as the status offenders. Having said that, we cut detention rates by 60% by some accounts, since the passage of SB 200. A lot of good stories to tell. The bad news is after 2011 our prison population dipped from the 23,000-range down to 19,000 at some point. Now we're back to 23,500. Most of our county jails are well over capacity as are our state prisons. We have no more room at the inn. There is much work to do. There is consensus among many on both sides of this debate that we can do better. We can start with the penal code."

Secretary John Tilley, Justice and Public Safety Cabinet



"My mom instilled in us as kids the value of kindness. She told us that maybe there is no wisdom that is greater than that. There may not be a wisdom greater than kindness...and I believe that our clients see that and I implore you, in a place where we are trying to learn to be more skillful in our practice and gain more knowledge, that we take the opportunity to be kind, because it is a great wisdom to be able to take our gifts and to reach forward for our clients and give them a small gift with everything we do. And so I ask you when we leave here today that you focus on kindness, that you be kind to yourselves, be kind to your coworkers and, most of all, kind to those that we stand with."

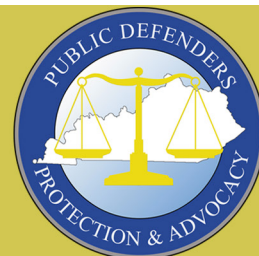
Melanie Lowe, Recipient of the 2016 Gideon Award



"The encouraging thing – the only thing in this polarized political world in which we live today, the only thing on which almost everybody agrees, is that the criminal justice system is broken. The only thing people agree on is that its time move past the death penalty; everybody agrees that the sentences are too severe and they have been for a long time. The recognition that it takes too long, that it costs too much, that it re-victimizes the victims, and that we have other alternatives like life imprisonment without parole, and that we risk executing the innocent. There's a greater recognition that prosecutors have too much power in the way they control prosecutions and too much power in the way they control sentences."

Stephen Bright, Southern Center for Human Rights

The Advocate



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- Expungement in Kentucky!
 - Legislative Update
- Child Support Speciality Court in Fayette County

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www.dpa.ky.gov

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